



STATEMENT OF THE ISSUE

The issue is to whether to approve the application of Respondent, Lake County Water Authority (Authority), for an Environmental Resource Permit (ERP) and consent to use sovereign submerged lands authorizing a restoration project in Lake Beauclair (Lake).

PRELIMINARY STATEMENT

On June 18, 2010, Respondent, Department of Environmental Protection (Department), issued a Consolidated Notice of Intent to Issue Environmental Resource Permit and Consent to Use Sovereignty Submerged Lands (Notice of Intent) authorizing the Authority to conduct a restoration project in the southwestern part of the Lake and four adjacent residential canals. On June 25, 2010, Petitioner, Joy Ann Wettstein Griffin, who resides on Lake Griffin, filed her Petition contesting the proposed agency action on several grounds. The matter was referred by the Department to the Division of Administrative Hearings on June 29, 2010, with a request that an administrative law judge conduct a formal hearing. The matter was initially assigned to Administrative Law Judge David M. Maloney. On August 3, 2010, the case was transferred to the undersigned.

After the Authority filed a Motion to Expedite Hearing on July 7, 2010, a final hearing was scheduled on August 9-11, 2010, in Tavares, Florida. The Authority's Motion to Dismiss

the Petition for lack of standing was denied by Order dated July 19, 2010.

At the final hearing, Petitioner testified on her own behalf and presented the testimony of her son, Daniel Max Loomis, who also resides on Lake Griffin. Also, she offered Petitioner's Exhibits 1-6, which were received in evidence. Exhibit 6 is a composite exhibit containing six sub-exhibits categorized as standing; precautionary principle, reverse onus, risk assessment; the dredging project; pollution; federal and state rules; and the United States Army Corps of Engineers permit application. Most of these matters were objected to by opposing counsel on numerous grounds, but they have been received for their limited evidentiary value. The Authority presented the testimony of Michael J. Perry, its Executive Director, who was accepted as an expert; Lance M. Lumbard, the Authority's Water Resources Project Manager and accepted as an expert; Dr. John Kiefer, a wetlands scientist accepted as an expert; Dr. Edmond J. Dunne, a wetlands ecologist with the St. Johns River Water Management District (District) and accepted as an expert; Dr. Michael F. Coveney, a limnologist with the District and accepted as an expert; and Edward Hayes, a limnologist with the Florida Fish and Wildlife Conservation Commission (FFWCC) and accepted as an expert. Also, it offered Authority Exhibits 1-17, which were received in evidence. The

Department presented the testimony of Nicole Martin, an Environmental Specialist II in its Orlando District Office and accepted as an expert. It also offered Department Exhibits 1-8, which were received in evidence.

There is no transcript of the hearing. Proposed Findings of Fact and Conclusions of Law were filed by Petitioner on August 13, 2010, and by the Authority and Department on August 18 and 20, 2010, respectively, and they have been considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

##### A. History of the Proceeding

1. The Authority, an independent special taxing district, was created by the Legislature in 1953 by special act as the Ocklawaha Basin Recreation and Water Conservation and Control Authority. See Ch. 29222, Laws of Fla. (1953). In 2000, it was renamed the Lake County Water Authority. Ch. 2000-492, § 2, at 745, Laws of Fla. Among its duties is to make "improvements to the streams, lakes, and canals in [Lake] [C]ounty." Id.

2. The Department is the state agency with the authority under Part IV, Chapter 373, Florida Statutes (2009),<sup>1</sup> to issue ERPs, as well as to act as the staff for the Board to authorize activities on sovereign submerged lands pursuant to Chapter 253,

Florida Statutes, and Florida Administrative Code Rule Chapter 18-21.<sup>2</sup>

3. The Lake is an approximate 1,118-acre water body located south and west of U.S. Highway 441, east of State Road 19, and north of County Road 448. It is a part of the Harris Chain of Lakes and is the first lake downstream (north) of Lake Apopka, connected by the Apopka-Beauclair Canal. The Lake discharges to Lake Dora by a connection at the northeast corner of the Lake, which connects with Lake Eustis via the Dora Canal. Lake Eustis then connects with Lake Griffin by Haines Creek. See County Exhibit 3; Petitioner's Exhibit 3. The waters from the Harris Chain of Lakes eventually discharge into the Ocklawaha River and then into the St. Johns River.

4. Beginning around World War II, intense agricultural activity, more commonly known as muck farms, took place around the shores of Lake Apopka, which resulted in significant amounts of pesticides, nutrients, and sediment being deposited in that water body. Because the Lake was at the downstream end of the Apopka-Beauclair Canal, it also received significant amounts of these contaminants. This led to a degradation of the aquatic plant community and the balance of fish and wildlife species that use the Lake. It is now characterized as a "eutrophic water body."

5. Since the mid-1980s, steps have been taken to restore the water quality in Lake Apopka. As a part of the restoration of Lake Apopka, the District acquired ownership of former muck farms located just northwest of Lake Apopka in an area known as the Lake Apopka North Shore Restoration Project, West Marsh. The Marsh in turn is divided into a number of field units, also known as cells.

6. In cooperation with the District and the FFWCC, over the last eight years the Authority has developed a plan to improve water quality and habitat in the Lake and four residential canals along the Apopka-Beauclair Canal. In general, the plan entails removing by hydraulic dredge sediments from an estimated 260 acres in the western portion of the Lake and from an additional 21 acres of combined residential canal segments. At least some of the dredging site is in state-owned sovereign submerged lands and requires the consent of the Board. The dredged sediment will be transported by pipeline 8.3 miles south of the Lake to Cells F and G of the West Marsh. Water from the sediment will be routed a short distance north to the Authority's Nutrient Reduction Facility (NuRF), treated to remove phosphorus and other contaminants, and then discharged downstream through the Apopka-Beauclair Canal. Due to permit conditions relating to dissolved oxygen levels, dredging activities can only take place between September 15 through

June 15 of any year. Therefore, resolution of this dispute has been made on an expedited basis.

7. On September 22, 2009, the Authority filed an application with the Department to implement its plan. See Authority Exhibit 10. Two requests for additional information were made by the Department, and responses were filed by the Authority. See Authority Exhibits 11 and 12. On June 18, 2010, the Department, through its Orlando District Office, issued its Notice of Intent to issue an ERP and consent to use sovereignty submerged lands. See Department Exhibit 10. The ERP contains a number of specific and general conditions applicable to this project, all designed to ensure that the relevant permit requirements are satisfied.

8. On June 25, 2010, Petitioner, a former member of the Authority and a long-time advocate of restoring the Harris Chain of Lakes, filed a Petition challenging the proposed agency action on numerous grounds. Her primary objection is that the sediment will be deposited at West Marsh on top of already-contaminated soils containing pesticides from prior farming activities, which may cause "environmental harm" to humans, fish, and aquatic wildlife. She also contends that no state permit should be issued until the United States Army Corps of Engineers issues a permit for the project; that diesel fumes from the dredging equipment used on the project may pollute the

air and water; that the project may violate federal, state, and local rules; and that sediment from the dredging activities in the Lake may drift downstream resulting in environmental harm to Lake Griffin, where she resides. No specific objection was raised regarding the consent to use sovereign submerged lands for dredging purposes.

9. For the last 26 years, Petitioner has resided on Lake Griffin, which lies within the Harris Chain of Lakes. Uncontroverted evidence establishes that her property is at least 21 miles downstream from the site of the dredging activities and around 27 miles from the deposition site. The path of the restoration site to Petitioner's property involves travel north through the Lake, then across Lake Dora to Lake Eustis, northwesterly through Haines Creek, and across Lake Griffin to the southwestern area of the lake where she resides. The path from the disposal site to her property requires further travel from Cells F and G within the West Marsh, down the Apopka-Beauclair Canal to the restoration site on the Lake, and then along the described path across Lakes Beauclair and Dora, Dora Canal, Lake Eustis, Haines Creek, and Lake Griffin. According to expert testimony at hearing, the likelihood of sediment transfer from the dredging site to Lake Griffin is "scientifically inconceivable." It can be inferred that the likelihood of the treated, discharged water from the disposal



site at West Marsh reaching her property is even more remote. This was not credibly contradicted.

B. The Project

10. The project involves the removal of 1.32 million cubic yards of human-induced sediment from an approximate 255-acre area in the southwestern part of the Lake and approximately 30,700 cubic yards from a 6.3-acre area within portions of four adjacent residential canals. Floating turbidity barriers and other measures around the dredge site in the Lake and canals will ensure that other areas of the lake system will not be impacted. The dredged material will be pumped through 8.3 miles of high density polyethylene pipe along the Apopka-Beauclair Canal to a disposal site known as Cells F and G, which are located on the west side of that Canal on property owned and operated by the District. Together, the two cells comprise around 980 acres. The sediment will be treated with polymers (a chemical process) to aid in the settling of organic solids. The supernatant water (i.e., the water overlying the deposited sediment) will then be pumped to the nearby NuRF, owned and operated by the Authority, treated with alum to remove nutrients and phosphorus, and discharged from the NuRF into the Apopka-Beauclair Canal, which ultimately discharges into the Lake.

11. A number of problems currently exist in the Lake, including loose sediments, high nutrient concentrations, and

navigational impairments. The project is designed to improve water quality by removing accumulated sediments at the mouth of the Lake that are re-suspended by wind and wave action and the propellers of motorboats, and which allow nutrients to enter the water. Also, the project is designed to improve habitat by allowing a more desirable substrate for aquatic plants to become established, and to improve navigation by removing accumulated sediment that currently impedes navigation. Therefore, the project will clearly restore that portion of the Lake to something much closer to its pre-disturbance bed conditions in a manner likely to benefit fish and wildlife, improve navigability, and eliminate re-suspension of materials from boating activities.

12. The Authority conducted a battery of chemical and physical testing to determine whether the sediments were useful as soil amendments for agriculture or for use in wetland restoration at the inactive muck farms north of Lake Apopka. Arsenic in the sediments was present at a mean concentration within the range of natural histosols (organic wetland soils) in the State, but not at levels suitable for transfer to residential or commercial properties. All metals were within allowable concentration levels established by the United States Environmental Protection Agency for land application of biosolids at farms. Organochlorine pesticides were present at

low levels. Residual pesticide concentrations, and all other metal concentrations in the sediments, would be suitable for residential, commercial, and farming properties.

13. Based on these characteristics and analyses, Cells F and G within the West Marsh were selected as the best practicable and safe alternative for the beneficial use of the sediments. The sediments will be used to cap much higher pesticide-contaminated soils in those Cells. This will create more shallow water depths in the Cells, facilitate greater cover of the former muck farms by wetland vegetation, and partially restore historic wetland conditions that existed prior to farming and soil subsidence.

14. The FFWCC concedes the possibility of impacts to fish and wildlife as a result of depositing spoil material into Cells F and G. While there is some potential for fish mortality in those Cells, the FFWCC believes the overall, long-term benefit to fish and wildlife in both the Lake and Cells F and G far outweigh any temporary, negative impacts that may result from the project.

15. Further, the evidence establishes that Cells F and G currently have sediment with appreciable levels of pesticides, as well as fish that contain sufficient levels of pesticides to be hazardous to fish-eating birds. Therefore, the contaminated fish are not an environmental asset. Because of this, the

District maintains deep water and thick vegetation in those Cells to discourage foraging by fish-eating birds. The deposition of the sediment will cover the existing contaminated soils with sediments having a much lower concentration of pesticides thus reducing the exposure to fish and wildlife. The evidence supports a finding that the deposition of the dredge sediments will increase the surface soil elevation in Cells F and G, which will aid the District in future restoration of emergent marsh communities on this site. Petitioner's contention that the possibility of harm to even a single contaminated fish outweighs the benefits of using that site as a depository has been rejected.

16. Petitioner also suggested that the sediment should be transported by truck to another location, such as a hazardous waste site, or that the project should be postponed for another year until testing is completed by a prospective vendor (Clean to Green) who claims its proposed methodology (yet to be tested and scientifically validated) can treat the sediment off-site in a safer manner. Given the overwhelming and uncontroverted scientific evidence offered at hearing in support of the project and the manner in which it will be undertaken, these alternatives are not deemed to be practical, reasonable, or supported by scientific evidence. The proposed deposition site is clearly the best and safest alternative.

### C. Rule Requirements

17. Rules 40C-4.301 and 40C-4.302 prescribe the conditions for issuance of an ERP. Generally, the first rule focuses on water quantity, environmental impacts, and water quality. The second rule generally requires that a public interest balancing test be made, and that cumulative impacts, if any, be considered. Further standards implementing the rules are found in the District's Basis of Review.

18. The evidence supports a finding that the Authority has given reasonable assurance that the project will not cause adverse water quantity impacts, adverse flooding to on-site or off-site property, adverse impacts to existing surface water storage and conveyance capabilities, or adverse impacts on the maintenance of surface or ground water levels or surface water flows.

19. The evidence supports a finding that the Authority has given reasonable assurance that the project will not adversely affect the quality of receiving waters or violate water quality standards. Reasonable assurance has also been given that the project will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters.

20. The project will have no adverse secondary impacts.

21. The project will not adversely affect works of the District and special basin or geographic area criteria.

22. The Authority has given reasonable assurance that the project is capable of being performed and functioning as proposed. Further, the Authority has sufficient financial, legal, and administrative capabilities to ensure that the project will be undertaken in accordance with the terms and conditions of the permit.

23. The evidence supports a finding that the project will not be contrary to the public interest, as defined in Rule 40C-4.302 and Section 373.414(1)(a), Florida Statutes.

24. All other contentions regarding the issuance of the ERP have been carefully considered and found to be without merit. Therefore, it is found that the requirements of the two rules have been met.

25. No dispute was raised regarding the consent to use sovereign submerged lands to conduct the dredging activities. Chapter 18-21 requires that the activity must not be contrary to the public interest. As to this issue, the evidence supports a finding in favor of the Authority.

#### CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto

pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

27. Petitioner, while sincere and well-intentioned, failed to establish that the project will affect her substantial interests. See Finding of Fact 9, supra. Therefore, she lacks standing to initiate this action. Even so, she was afforded a full opportunity to challenge the Department's proposed agency action and to offer proof in support of her assertions.

28. As the applicant for a permit, the Authority bears the burden of proving by a preponderance of the evidence that it has given reasonable assurances that that all permitting criteria will be satisfied. Reasonable assurances means "a substantial likelihood that the project will be successfully implemented." See Metropolitan Dade Cty v. Coscan Fla., Inc., et al., 609 So. 2d 644, 648 (Fla. 3d DCA 1992). It does not require absolute guarantees that the applicable conditions for issuance of the permit have been satisfied. See, e.g., Crystal Springs Recreational Preserve, Inc. v. S.W. Fla. Water Mgmt. Dist., et al., DOAH Case No. 99-1415, 2000 Fla. ENV LEXIS 41 at \*98 (DOAH Jan. 27, 2000, SWFWMD Feb. 23, 2000). These requirements have been met.

29. Based on the detailed site plans, engineering studies, and scientific testimony, the overwhelming evidence supports a conclusion that the Authority has given reasonable assurances

that all relevant criteria will be satisfied. The permit and consent to use lands should be approved.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Environmental Protection enter a final order granting the application of the Authority for an ERP and consent to use sovereign submerged lands.

DONE AND ENTERED this 23rd day of August, 2010, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the  
Division of Administrative Hearings  
this 23rd day of August, 2010.

ENDNOTES

1/ All statutory references are to the 2009 version of the Florida Statutes.

2/ All rule references are to the current version of the Florida Administrative Code.



COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.